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In the Supreme Court of the United States

OCTOBER TERM, 1985

MARGARET M. HECKLER, SECRETARY OF HEALTH AND HUMAN SERVICES, ET AL., PETITIONERS

v.

MICHIGAN ACADEMY OF FAMILY PHYSICIANS, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

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The court of appeals held in this case that the district court could entertain respondents' challenge to a regulation that affects the amount payable on a claim for benefits under the Part B Medicare Program. We have demonstrated in the certiorari petition that this holding is flatly inconsistent with the statutory preclusions of review applicable to the Part B Medicare Program (42 U.S.C. 1395ff, 405(h)) and with the decisions of this Court in *Weinberger* v. *Salfi*, 422 U.S. 749 (1975); *United States* v. *Erika, Inc.*, 456 U.S. 201 (1982); and *Heckler* v. *Ringer*, No. 82-1772 (May 14, 1984). See Pet. 11-20.

We also have explained that the decision below directly conflicts with the Fourth Circuit's decision in *Starnes* v. *Schweiker*, 748 F.2d 217 (1984), cert. denied, No. 84-1309 (Apr. 15, 1985), concerning the interpretation of 42 U.S.C. 1395ff (see Pet. 20-21), and with decisions of other courts of

appeals since *Ringer* that have construed 42 U.S.C. 405(h) to preclude judicial review pursuant to 28 U.S.C. 1331 even of "procedural" challenges arising under the Social Security Act (see Pet. 21).[1] In addition, the Eighth Circuit has recently held that Section 405(h) bars a district court from entertaining a procedural challenge arising under the Part B Medicare Program. See *Hatcher* v. *Heckler*, No. 84-5170 (Sept. 4, 1985).

Respondents do not dispute that the decision below conflicts with these decisions of other courts of appeals. Nor do they explain why that conflict does not warrant resolution by this Court. Respondents instead devote their brief in opposition to a reargument of several positions that were rejected by the Court in *Salfi*, *Erika*, and *Ringer*. None of these points has merit.

1. a. Respondents insist (Br. in Opp. 15-18) that the court of appeals' decision is not inconsistent with *Erika* because that case held only that judicial review of decisions concerning the amount of benefits under Part B is foreclosed by 42 U.S.C. 1395ff; in respondents' view, this case involves a challenge not to the amount of benefits paid on a Part B claim, but rather to the separate grouping of certain family physicians and other categories of persons who furnish Part B services. This attempt to distinguish *Erika* is unavailing.

As respondents concede (Br. in Opp. 13), *Erika* concerned a challenge to the carrier's calculation of the "reasonable charge" under Part B for particular medical services. Under 42 U.S.C. 1395u(b)(3), in determining the "reasonable charge" for such services, the carrier is to take into

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[1]See *American Federation of Home Health Agencies, Inc.* v. *Heckler*, 754 F.2d 896, 897-898 (11th Cir. 1984); *Ganem* v. *Heckler*, 746 F.2d 844, 848 (D.C. Cir. 1984); *Smith* v. *North Louisiana Medical Review Ass'n*, 735 F.2d 168, 171-172 (5th Cir. 1984).

account both the "customary charge" made by the physician and the "prevailing charge" in the area. The "prevailing charge" is to be calculated at a rate that would cover 75% of the customary charges made for "similar services" in the locality. In *Erika*, the plaintiff challenged the carrier's decision to calculate the "prevailing charge" on the basis of prices charged in the preceding calendar year, without taking into account intervening price increases. The plaintiff contended that this method of calculating the prevailing charge, which had the effect of imposing a ceiling on the amount of benefits paid by the carrier, violated the Social Security Act and implementing regulations. See 456 U.S. at 204-205 & n. 2. This Court, however, unanimously held that judicial review was precluded. *Id.* at 206-211.

Respondents' challenge is legally indistinguishable from that in *Erika*. Like the plaintiff in *Erika*, respondents challenge the carrier's calculation of the prevailing charge. The only difference is that respondents take issue with the carrier's identification of what are "similar services" for purposes of calculating that charge, while in *Erika* the challenge was to the year in which the similar services were rendered. This difference has no bearing on the availability of judicial review. In either case, the challenge is to the carrier's methodology in calculating the prevailing charge component of the "reasonable charge" for particular Part B services, which in turn determines the amount of benefits the carrier will pay for those services. *Erika* therefore squarely controls this case.

b. Respondents also argue (Br. in Opp. 11, 12, 15, 16, 17) that neither 42 U.S.C. 1395ff nor 42 U.S.C. 405(h) should be construed to preclude judicial review of what they term "statutory" issues that may arise in connection with the carrier's determination and payment of benefits. In this case, for example, respondents contend that the carrier's grouping of services in separate charge screens, depending

on whether they were performed by certain specialists or others, is inconsistent with the statutory provision in 42 U.S.C. 1395u(b)(3) that the carrier take into account the prevailing charge for "similar services."[2] However, respondents' assertion that 42 U.S.C. 1395ff does not bar such "statutory" challenges is foreclosed by *Erika* and *Ringer*. As noted above, the plaintiff in *Erika* contended that the carrier's formulation of the prevailing charge screen was contrary to the Social Security Act (456 U.S. at 205), but this Court nevertheless held that judicial review was foreclosed. Similarly, the plaintiffs in *Ringer* contended that the Secretary's instructions that required the carriers to refuse to pay any amount of benefits for BCBR surgery violated the Social Security Act and the Administrative Procedure Act (see *Ringer*, slip op. 7 & n.7), but this Court nevertheless held that judicial review was foreclosed under 42 U.S.C. 1395ff and *Erika* insofar as the case concerned the Part B Program (*Ringer*, slip op. 5 n.4).[3]

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[2]As we explained in the first certiorari petition in this case (84-120 Pet. 12 n.5), common sense suggests that there is a difference in the nature of services depending on whether they are furnished by a specialist or a generalist, because the former presumably brings greater expertise or experience to bear. At the very least that is a permissible interpretation of the term "similar services" in the Act, especially in view of the fact that the regulation authorizing the carrier to develop different charge screens on such a basis was promulgated in 1967, only one year after the Medicare Program went into effect. That contemporaneous and longstanding administrative interpretation accordingly should be binding on the courts (and therefore on respondents) even if, contrary to our submission in the text, judicial review were not entirely foreclosed in this case. *Chevron U.S.A. Inc.* v. *NRDC*, No. 82-1005 (June 25, 1984), slip op. 5.

[3]Respondents also contend that the preclusion of review under 42 U.S.C. 1395ff applies only to those issues that can be raised and decided in an evidentiary hearing before the carrier, such as the application of the Act, regulations and instructions to a particular claim and the arithmetic computation of the amount due on that claim. On this premise, respondents argue that because governing regulations (42

In any event, even if 42 U.S.C. 1395ff did not foreclose judicial review of respondents' statutory objections, review nonetheless would be foreclosed by 42 U.S.C. 405(h). The third sentence of Section 405(h) provides that "[n]o action against the * * * Secretary * * * shall be brought under section[] 1331 * * * of title 28 to recover on any claim arising under this subchapter." The Court held in *Ringer* that this provision bars a district court from exercising federal question jurisdiction over a statutory challenge to the "procedures" utilized by the Secretary for determining the amount of benefits due under Medicare. Slip op. 10-13.

2. Respondents also repeatedly assert (Br. in Opp. 11-19) that this case presents a question concerning the preclusion of judicial review of constitutional questions. Again, respondents are mistaken. The district court and court of appeals expressly did not reach the question whether the differing charge screens formulated by the carrier under the authority of the Secretary's regulation deprived family physicians of equal protection and due process. See Pet. App. 5a, 13a n.5, 27a-28a, 32a. If this Court reverses the judgment below finding jurisdiction over respondents' statutory challenge, the Court could remand to the court of appeals to consider whether the district court had jurisdiction over respondents' constitutional challenge and, if so, to decide the merits of

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C.F.R. 405.860) and the Carrier's Manual state that the carrier's hearing officer is bound by the Act and implementing regulations and instructions issued by the Secretary, *judicial* review of such issues is not foreclosed. See Br. in Opp. 3-4, 15, 16, 18. That is precisely the argument that was made by the American Academy of Family Physicians in *Erika* itself (80-1594 Amicus Br. at 11-18, 31), but it was not accepted by this Court. Similarly, in *Ringer*, the reimbursement claims under Part B were denied by the carrier on the basis of binding instructions that withdrew from the carrier hearing officer the question whether BCBR was a reasonable and necessary procedure covered by Medicare (slip op. 3-4), but the Court held that judicial review was barred under *Erika* (*Ringer*, slip op. 5 n.4).

that question. However, we do not believe that it is necessary for the Court to remand for still further proceedings in this case, which was filed almost nine years ago.

In *Schweiker* v. *McClure*, 456 U.S. 188 (1982), this Court, without addressing the question of the district court's jurisdiction, reviewed the merits of a constitutional challenge to certain provisions of the Medicare title of the Social Security Act. We may assume for present purposes that the Court in *McClure* believed that 42 U.S.C. 1395ff and 405(h) should not be construed to foreclose a judicial challenge to the constitutionality of provisions of the Social Security Act itself. Cf. *Hatcher* v. *Heckler*, slip op. 9 n.7. Compare *Salfi*, 422 U.S. at 762; *Johnson* v. *Robison*, 415 U.S. 361, 366-367 (1974). In this case, however, respondents do not challenge the constitutionality of any provision of the Social Security Act. They challenge only the constitutionality of one carrier's method of calculating the reasonable charge for particular services, in conformity with a regulation issued by the Secretary. *McClure*, *Salfi*, and *Johnson* do not indicate that it might be unconstitutional for Congress to foreclose judicial review of constitutional issues that arise in connection with such administrative determinations made under a program established by an Act of Congress.

There is no need to resolve that question in this case, however, because here, as in *Ringer* (slip op. 5 n.4), respondents' constitutional contention is too insubstantial to support subject matter jurisdiction in any event. The regulation respondents challenge simply recognizes the obvious practical reality that "[t]he range of prevailing charges in a locality may be different for physicians * * * who engage in a specialty practice or service than for others," and it accordingly permits a carrier to develop more than one range of prevailing charges that reflect

"[e]xisting differentials in the level of charges between different kinds of practice or service" (42 C.F.R. 405.504(b)). That clearly is not an irrational approach to determining the amount of payments to be made under the Medicare Program. The medical profession itself, through the system of board certification and in other ways, draws distinctions on the basis of a physician's specialization. The Constitution surely does not prohibit the Secretary from giving effect to those distinctions in making payments for services rendered by such physicians under this vast and complex social welfare program.

For the foregoing reasons and the additional reasons stated in the petition, it is respectfully submitted that the petition for a writ of certiorari should be granted, the judgment of the court of appeals should be summarily reversed, and the case should be remanded with instructions to dismiss the complaint.

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Acting Solicitor General

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